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No. 85-183

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1985 Term

JAMES E. AMEND and J.D. AMEND,
Petitioners,

v.

H. BRYAN POFF, JR., NAOMI HARNEY, MARVIN MARSHALL, J.E. BLACKBURN, BILL SHEEHAN, AMARILLO NATIONAL BANK, KEITH LINDMARK, DAVID C. MATTKA, D. BARRY STONE, R.A. WILSON, ROBERT L. TEMPLETON, GASSAWAY & GURLEY, NORTH STATE BANK and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondents.

Appeal From a Judgment of
The United States Court of Appeals
For the Fifth Circuit

REPLY OF RESPONDENTS, H. BRYAN POFF, JR. and NAOMI HARNEY TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney for Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, certifies that the list of persons and parties having an interest in the outcome of this case on Page 48-49 of Amends' Petition for Writ of Certiorari is correct.

STOKES & FIELDS

By: Gary W. Barnard
Gary W. Barnard

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Response to Petitioners' Statement of Jurisdiction

---

1. The Petitioners purportedly rely upon 28 U.S.C. Section 1253 as grounds for jurisdiction in this Court for their Petitioner for Writ of Certiorari. On its face that Statute has no applicability, as it deals with appeals from orders regarding injunctions heard by three member judicial panels. Those facts do not exist in this case.

2. Federal jurisdiction is lacking in this case, because the Petitioners' appeal shows on its face to be a collateral attack upon a ruling by State District Judge H. Bryan Poff, Jr., which granted a mistrial in State District Court. Such collateral attack upon a state district judge's action does not present a matter for Federal review.

3. Petitioners make no effort to ground their Petition for Writ of Certiorari upon any of the considerations governing such review under Rule 17 of the United States Supreme Court Rules.

4. There is no substantial Federal question.

STATEMENT

Respondent H. BRYAN POFF, JR. is the District Judge of the 47th District Court of Potter County, Texas. Respondent NAOMI HARNEY is the District Judge of the 251st District Court, Potter County, Texas. Since the Petition for Writ of Certiorari makes no complaints as to Respondent HARNEY this statement deals with the allegations against Respondent POFF.

In essence, the act by Respondent POFF that is complained of is the granting of a new trial after a jury verdict. A new trial was granted in response to post-trial motions and case authorities questioning the sufficiency of factual evidence supporting jury findings.

The case is still pending on Respondent POFF's docket.

ARGUMENT

Whether or not Federal jurisdiction obtains in this case depends primarily upon whether or not a "substantial Federal question" is presented, either under the United States Constitution or Federal Statute.

No appropriate Federal Statute has been presented by the Petitioners and therefore the question remains whether or not a "substantial Federal question" is presented under the Constitution.

The Petitioners allege violations of their rights under the Fifth, Seventh and Fourteenth Amendments.

Particular emphasis is upon the Seventh Amendment because JUDGE POFF granted a mistrial in a case where the jury had returned what the AMENDS contend was a verdict in their favor for $609,000.00 in damages. That argument is purely frivolous. Since Galloway v.

United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), the constitutionality of the directed verdict has been unquestionably upheld and since Baltimore & Carolina Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935) and Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), judgments n.o.v. have been upheld in appropriate cases without question. New trials granted in the sound discussion of the trial court have always been held constitutional and have been a part of our state and federal practice from the beginning of our jurisprudence. Tarlton v. Exxon, 688 F.2d. 973 (5th Cir. 1982), Spurlin v. General Motors Corporation, 528 F.2d. 612, rehearing denied 531 F.2d. 279 (5th Cir. 1976), and cases cited in both Courts of Appeals cases.

Neither can Petitioners' raise a federal question supporting jursidiction

under the Fifth or Fourteenth Amendments or the underlying Civil Rights Acts 42 U.S.C. Sections 1983 and 1985. There is and could be no allegation or claim that JUDGE POFF was acting outside of his jurisdictional authority when he ordered the mistrial in the AMEND case on trial in his Court. Petitioners claim injury resulting from JUDGE POFF's action in his capacity as Judge of the 47th District Court of Potter County, Texas and while acting in such capacity, JUDGE POFF is absolutely immune from liability and suit in whatever he does. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1972) is perhaps the most cited and the foundation case upholding the immunity of a Judge from suit and liability growing out of any acts within his "judicial jurisdiction". The Pierson case was brought under Title 42 U.S.C. Section 1983 by Plaintiffs who were arrested, tried and

convicted by Judge Spencer under a statute unconstitutional in the manner of its application to the Plaintiffs. In upholding Judge Spencer's absolute immunity from liaiblity for an unconstitutional conviction our Supreme Court said:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled

and fearless decisionmaking, but to intimidation.

> We do not believe that this settled principle of law was abolished by §1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congres meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that congress would have specifically so provided had it wished to abolish the doctrine."

In Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), Judge Stump was sued for erroneously and incorrectly approving the sterilization of a female. In again affirming the absolute immunity from suit of a Judge acting within his judicial jurisdiction, this Court said:

> "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it

was a "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, supra, at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall, at 351. Later, we held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, for the legislative record gave no indication the Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . .," Bradley, supra, at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the

> action he took was in error, done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall, at 351." (Emphasis ours)
>
> "Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall, at 347. The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit."

The doctrine of judicial immunity prevails even though the judge's actions may have been prompted by corruption although this certainly is not the case here. In Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), a Duvall County Texas District Judge wrongfully signed an injunction order, corruptly

motivated apparently by a bribe. While holding that the action of the Judge was sufficient state involvement to subject his co-conspirators to suit under 42 U.S.C. Section 1983, suit against the Judge under that section was dismissed. This Court held that while a Judge is not immune from criminal prosecution, he is absolutely immune from liability in suits for damages brought against him under 42 U.S.C. Section 1983 based upon acts performed in his judicial capacity.

Petitioners allege no facts amounting to corruption in their suits against these Judges and even if they did the Judges would be immune from suit and liability. McAlester v. Brown, 469 F.2d 1280 (5th Cir., 1972) was cited favorably by this Court in Stump v. Sparkman, supra. McAlester involved the judge who lost his temper and unjustifiably sentenced one to jail to satisfy his personal anger. All

of the considerations applied in McAlester are met in the case at bar. Whatever our Judges are alleged to have done (1) occurred either in the Judge's chambers or in the courtroom, (2) the controversy centered around a case then pending before the Judge, and (3) the acts occurred in the course of the Judge's actual handling of such case pending in his court. There is accordingly no escape from the doctrine of strict immunity in this case.

Even more basically, the AMENDS' Petition in this Court (and their Plaintiffs' Petition in the Trial Court), alleges no facts giving rise to a cause of action against any defendant. All of Petitioners' allegations are mere assumptions and conclusions. Conclusory allegations of denial of due process, malicious motivation and illegal motive when unsupported by pleaded facts are insufficient to create a cause of action under 42

U.S.C. Section 1983 and dismissal of the Complaint will result. Earnest v. Lowenthritt, 690 F.2d. 1198 (5th Cir. 1982).

Most fundamentally, there is no attempt by the AMENDS to support their Petition for Writ of Certiorari by defining any conflict in State or Federal decisions as outlined in Rule 17 of the Supreme Court Rules.

CONCLUSION

As the United States Fifth Circuit Court of Appeals says in this case from page three of their June 3, 1985 Opinion:

> "In this circuit, it is a "well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir. 1984). Although the complaint could be read as asserting a conspiracy between the judges and the other defendants, see Dennis v. Sparks, 449 U.S. 24 (1980), it alleged no specific facts that might

> establish such a conspiracy, other than the adverse rulings themselves. Absent such specific allegations, a charge of judicial collusion does not state a substantial federal claim. See Arseneaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982); Earnest v. Lowentritt, 690 F.2d 1198 (5th Cir. 1982); Phillips v. Mashburn, 746 F.2d 782 (11th Cir. 1984)."

Certainly where no cause of action can arise against judges acting within their judicial jurisdiction, there can be no "substantial Federal question" to support jurisdiction in this Court a rising from the AMENDS' illfated attempt to state such a cause of action and their Petition for Writ of Certiorari should be denied, for which your Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, pray.

Respectfully submitted,

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RESPONDENTS, H. BRYAN
POFF, JR. and NAOMI
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CERTIFICATE OF SERVICE

The undersigned attorney for Respondents, H. BRYAN POFF, JR. and NAOMI HARNEY, hereby certifies that true and correct copies of Respondents, POFF and HARNEY, to the AMENDS' Petition for Writ of Certiorari have been forwarded to counsel for each other party separately represented in this proceeding, or if unrepresented, to the party himself, by depositing same in a U.S. Post Office with First Class Postage Pre-Paid, properly addressed to counsel of record or the party at his post office address, all according to the provisions of Rule 28 of the Supreme Court Rules.

_____
Gary W. Barnard

Attorney for
Respondents, H. Bryan
Poff, Jr. and Naomi
Harney